IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR
Second Appeal No.674/2006

Office Notes, Memoranda of Coram appearances, Court's orders : Court's or Judge's orders or directions and Registrar's orders.

Coram : A.P.Lavande, J.
Dated : 20/3/2007

Heard Mr. Vyawahare, learned counsel for the appellant.

This appeal is directed against the judgment and decree dated 17th November, 2004 passed by 8th Adhoc Additional District Judge, Nagpur in Regular Civil Appeal No. 106/2002 dismissing the appeal filed by the appellant against the judgment and decree dated 28.1.2002 in Regular Civil Suit No.2355/1999 passed by 6th Joint Civil Judge, Jr. Dn. Nagpur Nagpur.

The appellant is original plaintiff who filed the above suit for removal of encroachment alleged to have been made by the defendant who is his neighbour. According to the plaintiff, the defendant had encroached upon the land of the plaintiff to the extent of 50 sq. ft. towards East – North side of this house. The defendant did not enter the witness box. The trial Court, upon appreciation of the evidence of the plaintiff dismissed the

suit holding that the plaintiff had not established his title to the property in respect of which claimed encroachment made by the defendant. Moreover, in the evidence, the plaintiff had stated that the encroachment was 8 sq.ft. x 2 sq. ft. and as such there was variance between the pleadings of the plaintiff and the evidence led by the plaintiff. The lower Appellate court also dismissed the appeal filed by the plaintiff.

Mr. Vyawahare, learned counsel appearing for the appellant submitted that the defendant had not entered the witness box and, therefore, an adverse inference ought to have been drawn by both the Courts below against the defendant. He further submitted that the plaintiff had filed an application for appointment of Commissioner to locate the extent of encroachment made by the defendant and the same was wrongly rejected by the trial Court. He, therefore, submitted that the decrees passed by both the Courts below deserve to be quashed and set aside.

Having perused the records and having considered the submissions made by learned counsel for the appellant, I do not find any merit in the present appeal. Insofar as dismissal of application for appointment of the Commissioner by the trial Court is concerned, I am of the opinion that in the circumstances of the case, the same cannot be patently illegal. The plaintiff himself was not sure as to the extent of

encroachment made by the defendant. Moreover, the plaintiff has not proved his title to the suit plot in respect of which he claims encroachment by the defendant. Therefore, mere fact that the trial Court had dismissed the application for appointment of Commissioner cannot come to the rescue of the appellant. Insofar as non stepping of defendant in the witness box is concerned, it is well settled that the plaintiff has to prove his case by cogent evidence. It is only when the plaintiff leads evidence in support of his case and defendant does not enter the witness box that the Court is entitled to draw an adverse inference against the defendant. In the present case the plaintiff has not even filed map along with the plaint showing the extent of encroachment. Considering all these aspects, I find no perversity in the findings recored by both the Courts below. The present appeal has no merit. No substantial question of law is involved in the appeal. Hence the appeal is summarily rejected.

JUDGE

A.